No. 85-607

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MAURA BURCHE, Petitioner,

vs.

CATERPILLAR TRACTOR CO., Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the U.S. Court of Appeals for the Seventh Circuit erred in dismissing Petitioner's appeal pursuant to Circuit Rule 8(b)(1) for a failure to prosecute.

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CATERPILLAR TRACTOR CO. ("Caterpillar") submits this brief in opposition to the Petition for a Writ of Certiorari filed by Maura Burche ("Burche"), Petitioner herein.

OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Seventh Circuit dismissing the Petitioner's appeal at second consideration of the case is reprinted as Appendix E to the Petition. The Memorandum of Judgment of the District Court upon second consideration directing a verdict in favor of Respondent is reprinted as Appendix G to the Petition. The Opinion of the United States Court of Appeals for the Seventh Circuit upon first consideration of the case is reprinted as pages I-1 through I-28 of Appendix I to the Petition. The District Court dismissed the Petitioner's claims at the initial consideration of the case. The opinions are not reported in West Publishing Co.'s System.

JURISDICTION

The Petitioner fails to set forth adequate requisites upon which jurisdiction of the Supreme Court may be invoked. Petitioner's reliance upon 28 U.S.C. §2680 (1985), is completely misplaced. That Section provides for exceptions to the Federal Tort Claims Procedure and has no application to the matter at hand. The Petition also invokes the jurisdiction of the Supreme Court under 28 U.S.C. §1254 (1985). However, no elements are set forth by the Petition pertaining to how §1254 purports to provide a jurisdictional basis for the Petitioner. The Petition deals almost exclusively with a discussion of 42 U.S.C. §2000(e). (Title VII of the Civil Rights Act of 1964 hereinafter "Title VII"). The action for which Burche appeals, i.e., the dismissal of her appeal, had nothing whatsoever to do with Title VII. Petitioner does not have a right to Supreme Court review by appeal under 28 U.S.C. §1254(2) because no statute was held unconstitutional by the Seventh Circuit Court of Appeals. Also, the Jurisdictional Statement of the Petition fails to provide a basis upon which discretionary review by Writ of Certiorari can be invoked by the Court under 28 U.S.C. §1254(1).

Therefore, Respondent asserts that the Petition has failed to adequately set forth sufficient jurisdictional requisites upon which to invoke the Supreme Court powers of review.

STATEMENT OF THE CASE

Petitioner Burche was hired by Respondent Caterpillar in 1975 to work as a rubber technician in and at its Laboratory located at the hiring facility designated as Caterpillar's Technical Center. In April, 1977, while so employed, Burche was hospitalized for psychiatric care and granted a medical leave from her employment due to a condition described by her physician(s) as schizophrenic paranoia. The medical leave of absence lasted from April, 1977, to March, 1979, when her physicians then agreed she was able to return to work; her physicians stipulated, however, that due to the recurrent effect of her mental illness she could not be assigned to work in any area in which three certain other employees might also be working. This restriction precluded Burche from working at her previous job location. Caterpillar searched for another job, and Burche was then offered another position away from the three employees. Burche declined to return to work in the job offered her and subsequently was terminated as having voluntarily quit her employment with Caterpillar. In 1979 Burche filed a charge with the then Illinois Fair Employment Practices Commission [which in 1980 was supplanted by the Illinois Human Rights Commission], alleging sex and national origin discrimination. That charge was cross-filed with the U.S. Equal Employment Opportunity Commission ("EEOC") pursuant to the requirements of Title VII. EEOC, in accordance with Section 706(d) of Title VII deferred action on her charge pending the outcome of her state administrative proceedings.

The state charge was thereafter amended to allege, in addition to sex and national origin, employment discrimination based on a claim of purported mental handicap. Upon an evidentiary hearing, the Administrative Law Judge recommended that the Complaint be dismissed with prejudice on March 30, 1981. The Human Rights Commission adopted the Administrative Law Judge's recommendation and dismissed the Complaint. Although that action was reviewable under

administrative review through the Illinois judicial system, Burche did not appeal from that decision. EEOC subsequently concurred in the result but in accordance with its statutory mandate issued a "right to sue" letter. Thereafter, on August 3, 1981, Burche filed a three-count Complaint in the U.S. District Court for the Central District of Illinois alleging, *inter alia*, unlawful employment discrimination under Title VII based on her female sex and her Romanian national origin. The District Court granted Caterpillar's initial pleading, a Motion to Dismiss, and dismissed Burche's Complaint in its entirety. On appeal, the Seventh Circuit Court of Appeals affirmed the District Court's decision as to two counts of the Complaint but reversed the District Court's dismissal on the pleadings as to Burche's employment discrimination claims and remanded that portion of Burche's Complaint for consideration on the merits, if any. Thereafter, the issues were joined and the matter was tried before the Court on April 12, 1984. After the presentation of Burche's case in chief, the Court in accordance with Rule 41(b) of the Federal Rules of Civil Procedure entered judgment in favor of Caterpillar as to the only issue before it, her Title VII claims. Appeal was again taken to the Seventh Circuit Court of Appeals. The Court of Appeals at the request of Burche's counsel granted three continuances or extensions of time to file Appellant's Brief. No such Brief, however, was ever filed. On November 27, 1984, the Seventh Circuit Court of Appeals dismissed her appeal pursuant to Circuit Rule 8(b)(1) for a failure to prosecute the Appeal.

REASONS FOR DENYING WRIT

There is no important question of federal law concerning the dismissal of a suit based on Appellant's failure to prosecute an Appeal to a Circuit Court of Appeals which needs to be addressed by the United States Supreme Court. Additionally, Petitioner has failed to properly comply with the United States Supreme Court Rules and the Federal Rules of Civil Procedure.

The law is well settled that federal courts have the power to dismiss a case for a failure to prosecute. *Link v. Wabash Railroad Company*, 370 U.S. 626, 734, 82 S. Ct. 1386, rehearing denied 371 U.S. 873, 83 S. Ct. 115 (1962). The *Link*, supra, decision involved a District Court's *sua sponte* dismissal with prejudice, under F.R.C.P. 41(b), of a plaintiff's suit brought for counsel's failure to prosecute. The Circuit Courts of Appeals have the same inherent authority to dismiss a case as do the Federal District Courts. Burche's attorney was given numerous extensions before the Seventh Circuit Court of Appeals dismissed the appeal pursuant to Circuit Rule 8(b)(1). Burche's Title VII case, the subject of that Appeal, had been tried on the merits. No proper Appeal was taken of that ruling to the Seventh Circuit Court of Appeals. In this Petition, Burche's sole claim hinges on her allegations that her counsel failed to prosecute her claim in the Seventh Circuit. It goes without saying that Burche is bound by her selected agent's actions. The law is well settled that a plaintiff is bound by the actions of his voluntarily chosen representative. *Link v. Wabash Railroad Company*, 370 U.S. 626, 82 S. Ct. 1386 (1962), *Smith v. Mossinghoff*, 671 F.2d 533 (D.C. Cir. 1982). No peculiar distinction has been made regarding dismissals of civil rights actions as contrasted with any other civil actions. *Washington v. Walker*, 734 F.2d 1237 (7th Cir. 1984). The United States Supreme Court stated in *Link*, supra, at footnote 10, that "if an attorney's conduct falls substantially below what is reasonable under the

circumstances, the client's remedy is against the attorney for malpractice." 370 U.S. 626, 634. Any further course of action by Burche should be limited to proceeding against her former counsel. A Petition for Writ of Certiorari is not the proper vehicle for the prosecution of her claim, if any, against her attorney.

A Writ of Certiorari must comply with the rules propounded by the Supreme Court. Burche has inserted in her petition masses of irrelevant and unnecessary material in contradiction of the "direct and concise" requirement of the Supreme Court Rules (S.Ct. R. 21.1), and the Federal Rules of Civil Procedure (FED. R. CIV. P. 8(e)). No Petition for Writ should be granted where the petitioner has failed to provide the court with a properly prepared petition. The various Circuit Courts of Appeals are not in conflict with the principles set forth herein.

A Writ of Certiorari would be inappropriate in these circumstances.

CONCLUSION

Wherefore, for all the foregoing reasons, the Petition for a Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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